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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAY 20 2011

Office: TEXAS SERVICE CENTER

FILE: [redacted]
SRC [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as a bilingual speech language pathologist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the beneficiary does not qualify for classification as a member of the professions holding an advanced degree but did not address whether the beneficiary might qualify as an alien of exceptional ability. The director further concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel presents a few assertions on the Form I-290B, Notice of Appeal, and indicated that she would submit a brief and/or additional evidence to the AAO within 30 days. Counsel dated the appeal July 15, 2009. As of this date, approximately 22 months later, the AAO has received nothing further. Thus, the appeal will be adjudicated based on counsel's statements on the Form I-290B and the record before the director. For the reasons discussed below, the petitioner has not established that a shortage and the oversubscription of visas in the lesser classification for which the petitioner has obtained an alien employment certification in behalf of the beneficiary warrants a waiver of the certification in the national interest. Significantly, the national interest waiver only waives the alien employment certification process, something the petitioner has completed, and not the other general requirements for classification pursuant to section 203(b)(2).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A)

> that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Eligibility for the Classification

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petitioner submitted materials from the Department of Labor's Occupational Outlook Handbook (OOH) indicating that most speech language pathologist positions require a master's degree. Thus, the beneficiary's occupation falls within the pertinent regulatory definition of a profession.

The Metropolitan University of Barranquilla in Colombia awarded the beneficiary the title of Speech and Language Therapist and Audiologist on July 25, 1997. An evaluation in the record equates this title with a Bachelor of Science in Speech-Language Pathology and Audiology from a regionally accredited university in the United States. Atlantico University in Colombia certifies that the beneficiary completed a course in Special Education in June 29, 2000. According to the same evaluation, this course is equivalent to 15 semester hours of special education transferable to a regionally accredited university in the United States.

As stated above, pursuant to 8 C.F.R. § 204.5(k)(2), a U.S. baccalaureate or a foreign equivalent degree plus five years of post-baccalaureate progressive experience is equivalent to an advanced degree. The petitioner must demonstrate that experience as of the filing date in this matter, November 6, 2007.

The petitioner submitted approval notices for nonimmigrant petitions in behalf of the beneficiary. The Manhattan Center for Early Learning and the petitioner filed these nonimmigrant petitions. The validity dates are October 2, 2003 through October 1, 2006, November 6, 2006 through June 14, 2007

and June 15, 2007 through July 8, 2007. According to the regulation at 8 C.F.R. § 204.5(g)(1), however, evidence of experience "shall" be in the form of letters from current or past employers. Thus, the AAO will not consider the approval notices as evidence of past experience. Moreover, the nonimmigrant visa approval notices do not establish the nature or length of employment.

The petitioner submitted a letter from [redacted] in Colombia confirming that the beneficiary worked there as a speech therapist from 1997 through 1999. The petitioner also submitted a letter from [redacted] confirming that the beneficiary worked as a speech therapist at the company's [redacted] from 1999 to 2001. In addition, the petitioner submitted letters from [redacted] a psychologist at Hospital Nazareth, and [redacted] Legal Representative of the Educational Center of the Caribbean, confirming personal knowledge of the beneficiary as an honest and responsible person. These letters do not establish any employment. The petitioner affirms that the beneficiary has worked there as a speech language assistant since November 2006.

The above letters establish employment from an unidentified month in 1997 to an unidentified month in 2001. The beneficiary only obtained her baccalaureate on July 25, 1997. As such, even if the beneficiary began work at [redacted] immediately after leaving Hospital Nazareth and worked at [redacted] through December 2001, these letters would establish no more than 31 months of employment. Thus, the addition of one year of employment with the petitioner as of the date of filing does not amount to five years of post-baccalaureate experience. Finally, as the beneficiary went from working as a speech therapist to a speech language assistant, the petitioner has not established that the beneficiary's experience is progressive.

As the petitioner has not documented that the beneficiary has at least five years of post-baccalaureate progressive experience, the petitioner has not established that the beneficiary qualifies as a member of the professions holding an advanced degree.

In response to the director's request for additional evidence, however, the petitioner asserted that the beneficiary qualifies as an alien of exceptional ability. The director did not address this claim.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

(C) A license to practice the profession or certification for a particular profession or occupation

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

(E) Evidence of membership in professional associations

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

If a petitioner has submitted the requisite evidence, U. S. Citizenship and Immigration Services (USCIS) determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. The AAO maintains *de novo* review. *See* 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d at 145; *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043 (recognizing the AAO's *de novo* authority).

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

As discussed above, the petitioner submitted the beneficiary's foreign equivalent degree to a U.S. baccalaureate and a certificate for 15 credits of coursework transferrable to a U.S. university. Thus, the petitioner has submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A).

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

In response to the director's request for additional evidence, counsel asserted that the petitioner was submitting letters and the beneficiary's self-serving resume as evidence of the beneficiary's 10 years of experience. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B), however, states that evidence of

experience must be in the "form of letter(s) from current or former employer(s)." Thus, the AAO will only consider the letters. As discussed above, the letters document less than five years of post-baccalaureate experience. Thus, the petitioner has not established that the beneficiary has ten years of experience as a bilingual speech language pathologist, the occupation for which the petitioner seeks the beneficiary.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(B).

A license to practice the profession or certification for a particular profession or occupation

The petitioner submitted a license from the State of Florida Department of Health, division of Medical Quality Assurance, confirming that the beneficiary, a speech-language pathology assistant, "has met all the requirements of the laws and rules of the state of Florida." The petitioner also submitted the beneficiary's passing scores for the New York State Teacher Certification Examination. The beneficiary's scores are for English and Spanish and are not specific to speech pathology.

Even if the AAO presumes that the license must be in the beneficiary's profession or occupation to qualify under this criterion, the beneficiary's Florida license is qualifying under the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The record documents that the beneficiary and her spouse jointly reported $38,333 in wages in 2004 and $22,565 in 2005. The record does not establish how much of these wages the beneficiary herself earned. The petitioner also submitted the beneficiary's 2006 Internal Revenue Service (IRS) Form W-2 reflecting wages of $17,827. Without evidence of comparative wages in the occupation, however, the petitioner cannot demonstrate that the beneficiary's wages are indicative of exceptional ability. Thus, the petitioner has not submitted qualifying evidence under the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D).

Evidence of membership in professional associations

The record contains no evidence relating to this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The record contains no evidence relating to this criterion, such as formal certificates of recognition.

In light of the above, the petitioner has not submitted evidence that qualifies under three of the evidentiary criteria. Nevertheless, the AAO will next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary has "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2). Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, in the final merits determination, the AAO must determine whether the beneficiary's degree or license is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

As stated above, the OOH materials the petitioner submitted state that most positions in the beneficiary's occupation require a Master's degree. Thus, the beneficiary's baccalaureate and 15 semester hours of transferrable credit are not indicative of or even consistent with a degree of expertise significantly above that ordinarily encountered among speech pathologists. The OOH materials also state that 47 states require speech-language pathologists to be licensed through passing the national examination on speech pathology. While only 12 states require such licensure for speech pathologists in public schools, it remains that the petitioner has not established how the beneficiary's license as a speech-language pathology assistant in Florida and passing scores in New York for certification as a teacher of English and Spanish demonstrate her expertise significantly above that ordinarily encountered among speech pathologists.

In light of the above, the petitioner has not established that the beneficiary qualifies as an alien of exceptional ability. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

National Interest

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest

> with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The use of the term "prospective" requires future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The record contains ample evidence regarding the importance of speech pathology. Thus, the beneficiary works in an area of intrinsic merit. The next question is whether the proposed benefits of the beneficiary's work, the availability of bilingual speech pathology services, would be national in scope. *NYSDOT,* 22 I&N Dec. at 217, n.3 provides the following examples where the proposed benefits would not be national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id.

While the petitioner has suggested students from other states may come to Florida for bilingual speech therapy, it remains that the impact of a single teacher is so attenuated at the national level as to be negligible. The petitioner does not suggest that the beneficiary would be developing national standards or curricula or otherwise performing services that might have a national impact. Thus, the petitioner has not demonstrated that the occupation provides benefits that are national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The basis of the petitioner's request for a waiver of the alien employment certification process has two elements. First, that there is an immediate national need for bilingual speech pathologists and, second, that the third preference visa for which the beneficiary is otherwise eligible with an approved alien employment certification is oversubscribed. Initially, the petitioner stated: "Please note that the case of NYDOT has suggested that significant processing delays in obtaining labor certifications may be viewed as a factor in favor of a grant of a national interest visa waiver." The petitioner provides no page cite to support this assertion.

NYSDOT states and then reiterates several times that a labor shortage is not a basis for the national interest waiver of the process designed to test the labor market. First, the decision states:

> With regard to the unavailability of qualified U.S. workers, the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages.

NYSDOT, 22 I&N Dec. at 218.

In response to a claim of a national shortage, the decision states that this assertion "should be tested through the labor certification process." *Id.* at 220. The decision further states that the issue of a shortage is not even within USCIS' jurisdiction. Specifically, the decision states: "The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor." *Id.* at 221. The decision continues:

> A number of the witnesses in this case assert that engineers with the beneficiary's qualifications are in short supply, yet are desperately needed because of the deterioration of U.S. bridges. The petitioner has never clearly explained why the job offer and thus the labor certification requirement should be waived. Given the asserted shortage of qualified engineers with the requisite training, and the evident existence of an offer of permanent employment, the situation appears to correspond closely to the very situation that the labor certification process was designed to address.

Id. at 222.

The petitioner in this matter contends that while the petitioner can secure, and indeed has secured, an alien employment certification on behalf of the beneficiary, the loss of the beneficiary's services while she waits for a visa in the lesser classification is not in the national interest. Contrary to the petitioner's assertion that NYSDOT addresses this situation, that decision does not imply that the national interest waiver is an appropriate means to secure a higher classification than is otherwise available for the position.

NYSDOT, 22 I&N Dec. at 222 does state that the petitioner in that case did not demonstrate that it would suffer a substantial disruption in its efforts to maintain New York's bridges and roads if legacy Immigration and Naturalization Service (now USCIS) did not approve the waiver. First, this statement, in the context of numerous statements that the final factor is specific to the beneficiary rather than the project or occupation, does not suggest that an employer need only demonstrate that the beneficiary's nonimmigrant visa status is expiring. Second, in that case, the petitioner had demonstrated that the benefits of the occupation are national in scope. Third, nothing in this statement suggests that the national interest waiver is an appropriate vehicle to secure a second preference visa for a beneficiary seeking to work in a position that would otherwise qualify as third preference. Congress limited the national interest waivers to the second preference classification. Neither the petitioner nor counsel cites to any legislative history or other source suggesting that Congress intended the national interest waiver as a means for employers to obtain second preference classification for positions that otherwise only qualify for third preference.

While the petitioner submitted evidence regarding the significance of the beneficiary's profession, such evidence cannot establish the beneficiary's eligibility for the benefit sought. *NYSDOT* explains this principle in several places. First, the decision states:

> Likewise, it cannot be argued that an alien qualifies for a national interest waiver simply by virtue of playing an important role in a given project, if such a role could be filled by a competent and available U.S. worker. The alien must clearly present a significant benefit to the field of endeavor.

NYSDOT, 22 I&N Dec. at 218.

In addressing arguments that the alien in *NYSDOT* worked in an important profession, the decision continues:

> It is indisputably true that the nation's bridges play a fundamental role in the transportation system and, by extension, in the economy itself which depends on the transportation of goods and mobility of commuters and tourists. The employer's assertions regarding the overall importance of an alien's area of expertise cannot suffice, however, to establish eligibility for a national interest waiver. The issue in this case is not whether proper bridge maintenance is in the national interest, but rather, whether this particular beneficiary, to a greater extent that U.S. workers having the same minimum qualifications, plays a significant role in the preservation and construction of bridges.

Id. at 220.

In concluding, the decision reiterates: "Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien as they relate to the job to be performed." *Id.* at 222-23.

While other factors are relevant, eligibility for the waiver ultimately must rest with the alien's own qualifications rather than with the importance of the position sought. In other words, USCIS generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this beneficiary's contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa classification her employer seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate the beneficiary's past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. The central question involves the merits of the individual alien as they relate to the job to be performed. *Id.* at 223. While the petitioner claims that the beneficiary has over 10 years of experience, this experience alone is insufficient. Specifically, *NYSDOT* states:

> Furthermore, with regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand.

Id. at 222.

The petitioner must demonstrate that the beneficiary has a history of past achievements that demonstrates the beneficiary would present a significant benefit "to the field of endeavor." *Id.* at 218. Merely demonstrating that the beneficiary would fill a position in which the United States has a shortage does not demonstrate the beneficiary's past influence in the field. The record lacks evidence that the beneficiary has developed new therapies, curricula or philosophy that has influenced the way speech therapists practice or similar evidence of her influence in the field.

The fact that the petitioner happens to originate from Colombia and, thus, speaks Spanish, is not evidence that she has or will make an impact on the field of speech pathology other than to benefit her specific clients, which, while having intrinsic merit, is not national in scope. If USCIS were to accept that the petitioner's bilingual ability warrants approval of the waiver, USCIS would need to approve the waiver for every alien from a non-English speaking country with a degree in a profession that provides services to the public (social workers, therapists, doctors, psychologists, etc.) The petitioner has not established that Congress intended the national interest waiver to serve as a blanket waiver for all bilingual aliens providing services to the public.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.